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COUNTY COURT OF HENRICO COUNTY.

VIRGINIA PASSENGER AND POWER COMPANY v. SOLOMON,
SHERIFF.

SHERIFFS—Riot—Call for Troops—Discretion—Removal—Gross Neglect of Official Duty—Virginia Code, Section 821. For a detailed statement of the law of the case, see instructions of court *in extenso*.

At the July term, 1903, of the County Court of Henrico county, a petition was filed by the Virginia Passenger & Power Company against Simon Solomon, Sheriff of the county, praying for his removal from office under the provisions of section 821 of the Code of Virginia, as amended by the Acts of 1889-1890, page 5, because of malfeasance, misfeasance, incompetency and gross neglect of official duty in having failed to protect the property of the petitioner, in his county, during the street car strike of June, 1903, by calling upon the Governor of the State for troops for the suppression of violence and rioting.

The statute in question is as follows:

Sec. 821. Removal of officer from office; proceedings therefor.—The county and corporation or hustings court shall have power to remove from office all county, city, and districts officers elected or appointed for their respective counties, cities, and districts for malfeasance, misfeasance, incompetency, or gross neglect of official duty: provided, however, that such power to remove the separate clerk of any circuit court and the clerk of the Chancery Court of the city of Richmond shall be vested only in said courts respectively: provided, further, that nothing in this section shall be construed to interfere with any power vested in the mayor of any city by section twenty of article six of the constitution of the state or to repeal any provision of the charter of any city or any ordinance in pursuance of such charter for the removal of any of its officers. All proceedings under this section shall be by order of or on motion before the proper court upon reasonable notice to the officer to be affected thereby; and such officers shall have the right to demand a trial by jury except in cases where the officer is an appointee.

At a later day in the term Sheriff Solomon appeared and traversed generally the allegations of the petition, whereupon issue was joined and after the taking of the testimony, the following instructions were given by the court, Hon. F. W. Sims, Judge of the County Court of Louisa county, having been designated by the Governor to hear the case:

1. The court instructs the jury that the law presumes that the defendant attended properly to the duties of his office, and the burden of proof to show the contrary by a preponderance of the evidence is on the Passenger and Power Company.

2. The discretion which the law imposes in the sheriff of calling for troops when the county authorities are unable to preserve the peace is a responsible and delicate one, and should be exercised with great caution, and in making up his mind on this point he had the right to consult, and, in part, rely on the knowledge and advice of competent people, and in deciding whether he so far violated his duty with respect to calling for troops as to have been guilty of gross neglect of official duty, the jury should consider the condition of affairs in the county, the location of the lines and property of the complainant in said county with respect to its nearness to the city of Richmond, and also the condition of affairs within the city, as they appeared to him, or as they should have appeared by the exercise of proper diligence, before the shooting occurred on the night of the 24th of June.

3. Unless the jury believe from the evidence that the sheriff acted with gross negligence, as defined below, in failing to call for troops until the 24th day of June, they should find in his favor on this point.

4. The jury are further instructed that by the word "malfeasance" is meant the doing of an act which is positively unlawful or wrongful—the performance of some act which the respondent had no right to do; and that by the word "misfeasance" is meant the wrongful and injurious exercise of lawful authority—the performance of an act which might lawfully be done, but is done in an improper manner, by which another person receives an injury; the word "incompetency" in the statute is to be taken in its common meaning and general acceptance. From this it will be seen that the issue before the jury is reduced to the single charge against the defendant of gross neglect of official duty, as no evidence has been introduced tending to support any of the other charges; but,

The jury are further instructed that the words "gross neglect of official duty" are relative terms. Where the official duty is comparatively unimportant, it would require a great want of care in order to convict an officer of "gross neglect." But if the occasion is one of serious moment, as, for instance, riot, tumult or resistance to law, which may cause breaches of the peace, involving damage

to human life or serious bodily harm, or injury to property amounting to felony, then a failure or omission of the officer to quell or suppress such riot, tumult or resistance to law, or to use all means given by law to discover or restrain the same, which a reasonable and prudent man would use under like circumstances to protect his own life or himself from serious bodily harm and his property from like injury, respectively, would be considered in law as "gross neglect of duty."

5. The court further instructs the jury that the duty imposed by law on the sheriff of a county, when there is riot, tumult or other resistance of law or imminent danger thereof in his county, which is or should be known to the sheriff, is to preserve, by every means available for that purpose and which the law gives him, the peace unbroken.

6. The moment he has reasonable apprehension of a breach of the peace, riot or other resistance to law, he is entitled and is, in fact, bound to intervene, and may arrest on view all persons breaking or attempting to break the peace, and if he does not do so, and is guilty of negligence as above defined in not doing so, he should be found guilty of gross neglect of official duty.

7. He must, by his personal exertions, as well as by such force as he can command, restrain rioters or others committing breaches of the peace, and, if necessary, pursue, arrest and take them. The foregoing are obligations arising from the nature of the office.

8. The question which you are to determine in this case is whether the defendant sheriff has done those things which the general rules of law require of sheriffs; whether he has kept the peace and restrained any rioters there may have been whom he should have restrained by such means as he had, as well as by his own personal exertion, and whether, if he did not, he could and should have restrained such rioters and kept such peace with the civil force and means at hand, and if they were not sufficient by calling on the Governor for troops. If such public peace has not been kept or such rioters restrained, or if injury has ensued to the complainant by such failure of the sheriff to do his duty in any one of these respects, because of his negligence as above defined, you should find the defendant, Simon Solomon, guilty.

9. You are further instructed that the complainant, the street car company, has a lawful right to run its cars over the streets and roads of the county of Henrico. In operating its cars, it was en-

titled to full protection of the laws of this commonwealth, and it was the duty of the sheriff of said county and those under his authority to see that this protection was given. This was due not only to the complainant and its property and the lives of its employees, but also to the public (men, women and children), using the same and who might be deterred or prevented from using this means of rapid transit by threats, intimidation or unlawful attacks upon said cars. To see that life and limb were not endangered, both that of the public and the employees of the street car company, and that the rights and property of said company, including its cars, were not assaulted or injured, was the duty of the sheriff. It was his duty to use reasonable diligence to ascertain whether assemblages, acts and assaults were likely to ensue as a result of this "strike."

To prevent such violation of the law, as well as the dispersing of any riot or other breach of the peace or resistance of law that might occur, or which he might reasonably apprehend would occur, and to prevent physical injury to or destruction of the property of complainant, or to arrest those committing such unlawful acts, the sheriff was bound to use all means which the law afforded and to do all that he knew or ought to have known was in his power to do that a reasonable or prudent man would have used or done under the circumstances, as set forth in paragraph number five above, and if the ordinary means of civil force which he had under his orders and authority were not sufficient to prevent in his county acts of disorder, lawlessness or breaches of the peace or riot or resistance to the law, if the jury believe that such did in fact occur therein, and that the defendant would have so recognized the situation in the absence of negligence, as above defined, and if he had used this diligence above defined, then it was his duty to call upon the Governor for troops, and if the jury believe from the evidence that Simon Solomon, sheriff of the county of Henrico, negligently as above defined, failed to learn of any breach of peace, threats, intimidation, assaults, throwing of stones or other missiles, shooting with deadly weapons at said cars or the persons in charge thereof, or the passengers thereon, in the county of Henrico, that did in fact occur in such county, or negligently and perversely disregard the same, or failed with the facts before him, or which, by the exercise of the diligence required by law, as above defined, to be exercised by such officer, he might have had before him, to act in the premises as a man

of ordinary prudence, honesty, courage and activity would have acted, and failed to use those means which an honest man would have used and did not do all in his power, both by said means or by his personal exertions to prevent violations of or resistance to law that may have occurred in the county of Henrico, they should find the said Solomon guilty of gross neglect of duty.

10. The officer who is clothed with the authority to call upon the Governor of the State for the armed forces of the commonwealth in aid of his civil authority in time of riot, tumult, resistance of the law or imminent danger thereof is bound to use the diligence above defined—to know the exact occasion when the troops should be called for, and if he fails on such occasion through negligence as above defined to call for troops, and injury to persons or property or to the public peace in said county ensues, then he is guilty of gross neglect of duty, as set forth in the statute, and the jury must so find.

11. Merely because a ministerial officer has a discretion to exercise as to the methods and instrumentalities to be employed in the discharge of a duty imposed upon him by law, he is not in consequence thereof possessed of the immunity of a judicial officer. Although the calling out of the militia under section 368 of the Code depends upon the discretion of the sheriff, yet when he negligently, as above defined, refuses or fails to call them out on a proper occasion, he takes upon himself the responsibility of an injury which may result therefrom to the public peace and good order, and the occurring of said violation of the public peace will justify his removal. Mere honesty of intention, nor the fact that he fully believes that the best thing was not to call out the militia, will not excuse him unless such belief would have been entertained under the circumstances by a man of ordinary prudence and honesty.

Wyndham R. Meredith, for petitioner.

George Bryan, acting Attorney for the Commonwealth.

Hill Carter and *H. M. Smith, Jr.*, for respondent.

The jury not being able to agree upon a verdict, the cause was continued, and at the September term, 1903, dismissed at the costs of the petitioner.

(EDITORIAL NOTE.—Notwithstanding the disagreement of the jury and the fact that no conclusion was reached by it upon the evidence, this case is

one of public importance and interest as being of first impression in this state, and as defining the responsibilities of a sheriff as the chief conservator of the peace of his county. The instructions should be read carefully and as a whole. The essence of the law is contained in the tenth instruction, and was doubtless an application of *Rex v. Pinney*, 5 Carrington and Payne, 254. In that case an information was filed against the defendant, mayor of the city of Bristol, charging that on the 29th of October, 1831, there was a riot in the city, and a great destruction of property; that on the next day the rioters attacked and destroyed Bridewell, attacking the gaol and setting the prisoners at liberty, demolishing the bishop's palace and breaking open, burning and demolishing a number of dwelling houses; that defendant being mayor, not regarding the duties of his office, but neglecting the same, did not use due means to put an end to the riot, that he did not organize a sufficient force, nor give such orders and directions as he ought and was bound to do; that he absented and concealed himself, and permitted the rioters to continue assembled for a long time.

In charging the jury, Mr. Justice Littledale said:

"Now a person, whether a magistrate or a peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty; and how difficult it is to hit that precise line, will be a matter for your consideration, but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case of mayors and magistrates, or whether, as a peace-officer, he has been compelled to take the office that he holds, the same rule applies; and if persons were not compelled to act according to law, there would be an end of society; but still, you ought to be satisfied, that the defendant has been clearly guilty of neglect, before you return a verdict against him; and here, I ought to remark, that mere good feeling, or upright intentions, are not sufficient to discharge a man, if he has not done his duty. The question here is, whether the defendant did all he knew was in his power, and which would be expected from a man of ordinary prudence, firmness, and activity, to suppress these riots. Did he use those means, which the law requires to assemble a sufficient force? Did he make all the use of those means which an honest man ought to do by his own personal exertions? According to the testimony of Mr. Sergeant Ludlow, the defendant acted under his advice; he therefore had the best legal advice that a public officer could be reasonably expected to have; and Major Mackworth, who is a man of high military rank and of great spirit, says that the defendant was, in a military point of view, willing to act on his advice; and if he acted under such advice, it forms matter for your serious consideration in the course of the case; not that, if the defendant acted contrary to law, it will be sufficient to shelter him that he acted under the advice of others; still less will it guard him as to matters not within the scope of the advice; however, you will consider whether the advice so given was not the correct advice under all the circumstances. With respect to

the not providing a sufficient force there is no doubt that very great calamities afterwards occurred; but I think you ought not to consider that; for, although, if it could have been foreseen that the military would have been withdrawn and such destruction would have ensued, it was possible that a very large civil force might have been collected by over-exertion on the part of the magistrates; yet you ought to judge only of what appeared at the time, because, as the magistrates could not foresee all this, they might have collected an immense force, and no riot might have taken place, and then the magistrates would only have been laughed at by everybody. Another charge is, that being required to ride with the 14th Light Dragoons, the defendant would not do so. In my opinion he was not bound to do so. I do not think that a justice of peace is bound to ride up and charge with the military. The military officer may act without any magistrate, but no prudent military man would do so, because his acting may be attended with the loss of life; but *if a magistrate gives him an order to act*, that is all that is required.")